IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CMPMO No.205 of 2006 and
CMPMO NO. 206 OF 2006

Date of Decision: 1st August, 2006.

CMPMO No. 205 of 2005	
Himachal Financial Corporation	Petitioner
Versus	
M/s Ashok Spun Pipes and another	Respondents
CMPMO No. 206 of 2005	
Himachal Financial Corporation	Petitioner
Versus	
Jaswan Resorts and others	Respondents

Coram

The Hon'ble Mr. Justice V.K.Gupta, C.J.

Whether approved for reporting[1]?

For the petitioner: Mr.Ajay Kumar, Advocate.

For the respondent: Mr.Naresh Kaul, Advocate, for respondent No.1 in CMPMO No. 205 of 2005
Mr.Pankaj Sharma, Advocate, vice Counsel for respondents 1 and 2 in CMPMO No.206 of 2005.

V.K.Gupta, C.J. (Oral)

By this common judgment, both the petitions are being disposed of together.

In two separate Applications filed under Section 31 of the State Financial Corporations Act, 1951 (1951 Act, for short), the learned District Judge, Kangra at Dharamshala after holding that the

[1] Whether the reporters of Local Papers are allowed to see the Judgment?

respondents in CMPMO No. 205 of 2005 were liable to pay Rs.67,35,514.43 and in CMPMO No.206 of 2005 they were liable to pay Rs.13,83,888/-, to the petitioner, ordered the sale of the properties pledged and hypothecated by the respondents with the petitioner-Corporation, details whereof were contained in the last, operative parts of the aforesaid judgments.

Section 31 of 1951 Act being a special provision for enforcement of claims by a Financial Corporation does stipulate that where an industrial concern makes any default in the repayment of any loan etc. etc., any Officer of the Financial Corporation may apply to the District Judge concerned for securing an order, amongst other orders, for the sale of the property pledged, mortgaged, hypothecated or assigned to the Corporation as security for the loan or advance etc. Clause (a) of sub-section (1) of Section 31 of 1951 Act deals with this particular aspect, which is reproduced hereinunder for ready reference:-

> **"(a) for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or"**

Procedure for disposing of an application under Section 31 (*supra*) and for passing consequential orders is prescribed in Section 32 of 1951 Act, in which, inter alia, it has been laid down that after issuing notices to the respondents in an Application under Section 31, the learned District Judge shall pass final, absolute order, which in effect and substance means ordering the attachment of the property in the sense confirming the earlier ad-interim order and at the same time also directing the sale of the attached property. Sub-section (8) of Section 32 specifically lays down that an order of attachment or sale of the property passed under Section 32 shall be carried into effect as far as practicable in the manner provided in the Code of Civil Procedure for the attachment or sale of property in execution of a decree, as if the Financial Corporation were the decree-holder. For ready reference sub-section (8) of Section 32 is reproduced hereunder, which reads thus:-

> **"(8) An order of attachment or sale of property under this section shall be carried into effect as far as practicable in the manner provided in the Code of Civil Procedure 1908 (5 of 1908) for the attachment or sale of property in execution of a decree**

as if the Financial Corporation were the decree-holder."

In the case of *Maganal* vs. *M/s Jaiswal Industries, Neemach*, reported in AIR 1989 SC 2113, it has been observed as under:-

> **"We shall first deal with the scope and import of the expression "as far as practicable" and "in execution of a decree as if the Financial Corporation were the decree-holder" used in sub-section (8) of section 32 of the Act. Without anything more the expression "as far as practicable" will mean that the manner provided in the Code for attachment or sale of property in execution of a decree shall be applicable in its entirety except such provision therein which may not be practicable to be applied. It will be for the person asserting that a particular provision with regard to execution of a decree for sale of an immovable property contained in the Code of Civil Procedure will not apply to execution of an order under S.32 of the Act on the ground that it was not practicable to show as to how and why it was not practicable. As regards the second expression namely "in execution of a decree as if the Financial Corporation were the decree-holder" it may be pointed out**

that even though an order under S.32 as seen above is not a decree stricto sensu as defined in S.2(2) of the Code and the Financial Corporation would not as such be called the decree holder, section 32(6) of the Act imports a legal fiction whereby the order under S.30 of the Act for purposes of execution would be a decree and the Financial Corporation a decree holder. Apparently, the person against whom such decree has been executed namely the debtor of the Financial Corporation would be the judgment debtor. In *East End Dwellings Company Limited* v. *Finsbursy Borough Council*, (1952) AC 109, Lord Asquith at page 132 observed "if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed must inevitably have flowed from or accompanied it….. The Statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs".

By thus holding that by virtue of a legal fiction created under sub-section (8) of Section 32 the Corporation would be a decree-holder, their Lordships of the Supreme Court went to the extent of observing that the person against whom such decree is being executed, namely, the debtor of the Financial Corporation should be treated as the judgment-debtor. In the same judgment, it was accordingly held as under:-

> **"As is apparent from the plain language of S.32(8) of the Act the legal fiction was created for the purpose of executing an order under S.32 of the Act for sale of attached property as if such order was a decree in a suit for sale and the Financial Corporation was the decree holder whereas the debtor was the judgment debtor. Consequently, the provisions of the Code of Civil Procedure with regard to execution of a decree for sale of mortgaged property contained in O.21 of the Code including the right to file an appeal against such orders passed during the course of execution which are appealable, shall apply mutatis mutandis to execution of an order under S.32 of the Act unless some provision is not practicable to be applied."**

In the light of the aforesaid established legal position, it becomes manifestly clear that by passing the aforesaid orders on 25th September, 2002, and 7th April, 2003 in the aforesaid two Applications, in exercise of his jurisdiction under Section 31 read with Section 32 of 1951 Act, the District Judge has clearly ordered the attachment of the properties mentioned in the operative parts of the aforesaid judgments and had also consequently directed that the sale of the said properties be effected.

Sub-section (8) of Section 32 (supra) clearly lays down as to how and in what manner a final order passed under Section 31 read with sub-section (5), or sub-sections (6) and (7), (both sub-sections being read together) has to be carried into effect and implemented. The learned District Judge in the operative parts of the judgments dated 25th September, 2002 and 7th April, 2003 himself directed that the sale be effected. As per the plain reading of sub-section (8), the machinery prescribed under Code of Civil Procedure for the attachment and sale of property in execution of decree has to be put into motion.

It is in the aforesaid background that the petitioner-Corporation filed applications under Order 21 Rule 66, CPC, which provides for a methodology for

issuing proclamations of an intended sale. Rules following Rule 66 as occurring in Order 21 do also provide for a machinery as well as methodology for taking forward the aforesaid proclamations of sale and for actually selling the property in execution of a decree. To my mind the Corporation took a correct step, a right decision by approaching the learned District Judge by filing applications under Order 21 Rule 66, CPC because the mandate contained in sub-section (8) of Section 32 clearly spelt out the aforesaid as the only option available to the Corporation. The learned District Judge, however, vide the impugned orders dismissed the aforesaid applications of the petitioner on the only ground that since no execution petition was pending in his Court, the application under Order 21 Rule 66, was not maintainable. Perhaps in adopting the aforesaid view the learned District Judge might be of the opinion that formal Execution Applications under Order 21 Rule 10, CPC were required to be filed by the petitioner for implementing the judgments dated 25th September, 2002 and 7th April, 2003. Yes, someone might have done so. Yes, filing of a formal execution application under Order 21 Rule 10, CPC may also have been a methodology available to a Corporation seeking to implement a final order passed

under Section 31 read with Section 32 of 1951 Act. What however would have been the form or the methodology is not very relevant because the substance of the action initiated by the Corporation based on the mandate contained under sub-section (8) of Section 32 (*supra)* was only to implement the order of attachment and sale, basically the order of sale and this could have been reasonably and sufficiently achieved by taking recourse to Order 21 Rule 66 by moving applications under this specific provision of law. Whether, therefore, a Corporation moves a formal application under Order 21 Rule 10 CPC, or without doing so moves an application under the specific provision of Order 21 Rule 66, CPC, the effect and the result is the same. I am saying so because whereas Order 21 Rule 10 application initiates the process of execution, which ultimately culminates into the passing of an attachment order as well as order of sale, in the present cases since under the aforesaid provisions of 1951 Act the orders of attachment and sale already had stood passed, no meaningful purpose would be served by moving formal applications under Order 21 Rule 10, CPC. The purpose would have been effectively served by moving applications under Order 21 Rule 66, CPC.

The aforesaid apart, whether the application is moved under Order 21 Rule 10 CPC, or it is moved under Order 21 Rule 66, CPC, it is an application, in effect and substance in the nature of an execution application and ought to have been treated as such by the learned District Judge. I am saying so because of the clear language employed in sub-section (8) of Section 32 (supra), which unmistakably does suggest that while seeking to implement the orders of sale, the Corporation has to invoke the provisions of Code of Civil procedure for the attachment and sale of property in execution of the decree and the only manner this could be achieved was to file an application under Order 21 Rule 66 CPC. Every application, therefore, filed in whatever form for the aforesaid purpose should be treated as an execution application. The learned District Judge, therefore, erred in law in holding that no execution application was pending before him. The application under Order 21 Rule 66, CPC in the background under which it came to be filed, ought to have been treated as an execution application itself.

For the foregoing reasons, both the petitions are allowed. The impugned orders in both the petitions are set aside. In the light of the aforesaid observations, it is directed that the

applications filed by the Corporation under Order 21 Rule 66, CPC be treated as execution applications but the procedure prescribed in Order 21 Rule 66 and all the provisions connected therewith shall be strictly followed. The matter before the learned District Judge accordingly shall stand revived.

The parties through their learned counsel are directed to appear before the learned District Judge Kangra at Dharamshala on 6th September, 2006. The learned Court below shall carry the proceedings further and take these to their logical conclusions.

1st August, 2006 **(V.K.Gupta), C.J.**
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